At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on November 13, 2001.

Present – Hon. Peter Tom, Justice Presiding
Israel Rubin
John T. Buckley
George D. Marlow, Justices.

5249

MARTIN GOLD, etc.,

Plaintiff-Appellant,

—against—

SQUADRON, ELLENOFF, PLESENT & LEHRER, et al.,

Defendants-Respondents.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Louis York, J.), entered January 6, 2001,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed for the reasons stated by York, J., with costs and disbursements.

ENTER:

CATHERINE O'HAGAN WOLFE
Clerk.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

Index No. 102276/99

MARTIN GOLD, as Trustee of the Martin Gold, Attorney at Law, P.C. Defined Benefit Pension Plan dated 12-10-87, individually and on behalf of a class of persons similarly situated,

Plaintiff,

—against—

SQUADRON, ELLENOFF, PLESENT & LEHRER, SQUADRON, ELLENOFF, PLESENT & SHEINFELD, LLP and IRA L. SORKIN,

Defendant.

LOUIS YORK, J.:

Defendants move pursuant to CPLR 3211(a)(5) and (7) to dismiss the compliant.

Plaintiff brought this action individually and on behalf of other New York residents who own unsatisfied promissory notes issued by Towers Financial Corporation ("Towers"), a glorified Ponzi scheme which fell apart when an investigation by the Securities and Exchange Commission ("SEC") exposed the fraudulent nature of Towers' operations. Defendants are the attorneys who represented Towers from 1988 until its demise in bankruptcy. The gravamen of plaintiff's complaint is

that defendants knowingly aided and abetted Towers in its systematic defrauding of investors.

Plaintiff had asserted these and other claims against defendants in a federal action which also involved other parties (*In re Towers Financial Corporation Noteholders Litigation*, No. 93 Civ 0810, see complaint at movants' exhibit 2, "the federal action"). In 1995, the federal magistrate presiding recommended that the district court dismiss the federal claims against defendants for failure to state a cause of action, but declined to exercise its pendent jurisdiction over the common-law state claims now at issue (1995 WL 571888, movants' exhibit 4). The district court adopted the magistrate's recommendations but granted plaintiff leave to replead one of the federal law claims (*In re Towers*, 936 F Supp 126 [SDNY 1996]). The repleaded claims were subsequently dismissed on remand after appeal (*Dinsmore* v. *Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, n.o.r., 1998 WL 93337 [SDNY 1998]), and a final judgement dismissing all claims against defendants was entered in November 1998 (movants' exhibit 6). In March 1999, a month after this action was commenced, the appeal of the district court's decision was withdrawn with prejudice by so-ordered stipulation (movants' exhibit 7).

Defendants now seek dismissal of the complaint herein on the grounds that it is: (i) time-barred, (ii) barred by the doctrine of collateral estoppel, and (iii) facially insufficient to state of cause of action. At the outset, the court notes that although this action was purportedly brought as a class action, plaintiff has not made any attempts to certify the class. Hence, for purposes of this motion, the court will only consider the claims alleged in the complaint as they relate to plaintiff individually.

The timeliness of the claims is the threshold issue. It is undisputed that all of the claims at issue were timely asserted in the consolidated federal action. Defendants contend that all of plaintiff's claims against them are time-barred under the applicable statutes of limitations, and plaintiff cannot rely an CPLR 205(a) to toll the clock during the pendency of the federal action. Plaintiff contends that the fraud claims. subject to a limitations period of six years, from time of discovery (CPLR 213[8]), were timely asserted in this action; that CPLR 205(a) applies; and that at any rate there are two other applicable tolling provisions.

Ab initio, the court finds no merit in plaintiff's contention that his fraud-based claims are timely. Plaintiff's construction of the statute of limitations applicable to his fraud-based claims is incorrect. CPLR 213(8) cannot be read in a vacuum to yield six years from when the fraud was discovered. Rather, it must be read in conjunction with CPLR 203(g), which results in the well established rule that a fraud claim must be asserted either within six years of its accrual (i.e., when defendant committed the wrongful act) or within two years of when plaintiff discovered or should have discovered the alleged fraud (*Hammond* v. *Reichbach*, 232 AD2d 254 [1st Dept 1996]; *Ghandour* v. *Shearson Lehman Brothers Inc.*, 213 AD2d 304 [1st Dept 1995]; *Pearl-Wick Corporation* v. *Chase Manhattan Bank, N.A.*, 125 AD2d 249, 252 [1st Dept 1986], affd 71 NY2d 823 (1991). The discovery date computation is meant to aid those plaintiffs who do not become aware of the fraud until after the six-year statute of limitations his expired. Such was not the case here.

According to plaintiff's complaint, the last alleged incident of fraud occurred on December 26, 1992, when plaintiff made his last investment in Towers (complaint,

¶7). Since this action was not commenced until February 1999, more than six years later, it is untimely under CPLR 213(8). Similarly, the complaint alleges that "the earliest that plaintiff . . . could have known about the scheme . . . alleged herein was February 8, 1993, the day after the SEC filed a civil suit . . . [and t]he earliest that plaintiff . . . could have known about [defendants'] conduct was . . . on June 7, 1993." when defendants were named as defendants in the federal action (complaint, ¶49). Using June 7, 1993 as the date of discovery does not serve to extend the statutory limitations period until February 1999. Based on the foregoing, the court finds that all of plaintiff's claims are time-barred unless he can establish that the statute of limitations was tolled.

With respect to the availability of a toll pursuant to CPLR 205(a), defendants argue that plaintiff cannot rely on the statute regardless of when the federal case is deemed to have terminated. If the case was concluded by the appeal's withdrawal in March 1999, the termination was voluntary thus voluntary CPLR 205(a) inapplicable. If the case was terminated when final judgment dismissing the complaint was entered on November 18, 1998, CPLR 205(a) is unavailable as a toll because plaintiff, who did not serve the summons on defendants until May 27, 1999, failed to comply with the statutory requirement of effecting such service within six months. Plaintiff counters that the federal case was not terminated until March 9, 1999, when the appeal was withdrawn, but such withdrawal should not be deemed a proscribed voluntary discontinuance because the stipulation withdrawing the appeal was "so ordered" by the federal court. Additionally, plaintiff argued that the key commencement date for the instant action is February 5,

1999, when the summons was filed, rather than when it was served on defendants.

CPLR 205(a) provides in pertinent part that "[i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance . . . plaintiff . . . may commence a new action upon the same transaction or occurrence . . . within six months after the termination provided that . . . service upon defendant is effected within such six-month period." The key to the termination of a federal case lies in the trial court's decision and whether dismissal of the state claims is with or without prejudice (*Dwyer* v. *Cahan*, 150 AD2d 172, 173 [1st Dept 1989]). Under New York law, such a decision does not become meaningful until it has been reduced to a judgment (see CPLR 5011). Here, the district court explicitly dismissed the state law claims without prejudice, after declining to exercise pendent jurisdiction over them. Plaintiff's argument that the federal case was not terminated until the appeal was withdrawn is nothing more than a red herring, The appeal had nothing whatsoever to do with the state law claims, which were dismissed by the district court without protest or appeal by plaintiff.

Based an the foregoing, this court finds that for purposes of CPLR 205(a) the federal court action, in which plaintiff herein asserted similar state law claims against defendants herein based upon the same facts as are now at issue, was involuntarily terminated on November 18, 1998, upon docketing of the final judgment dismissing those claims without prejudice. Hence, to avail himself of the tolling provisions of CPLR 205(a) plaintiff had to commence this action and effect service on defendants within six months of November 18, 1998. Although this action was commenced (i.e., filed; see CPLR 304) during that period, service on defendants was not effected

until May 27, 1999 at the earliest (see affidavits at movants' exhibit 8). Since service was not made within the statutorily prescribed period, the court finds that plaintiff cannot rely on CPLR 205(a) to toll the statutes of limitations for the pendency of the federal action (*Pyne* v. *20 E. 35 Owners Corp.*, 267 AD2d 168 [1st Dept 1999]).

The second tolling provision relied upon by plaintiff is 28 USC § 1367(d). Since contrary to CPLR 205(a), which exempts voluntarily dismissed claims from tollability, this statute favors voluntary dismissals, plaintiff takes the opposite view of the facts he posited in connection with his CPLR 205(a) arguments. Now, plaintiff contends that the state claims asserted in the federal action were voluntarily dismissed on March 9, 1999, when the withdrawal of the appeal was filed, and thus the applicable statutes of limitations were tolled during the pendency of the federal action plus 30 days by 28 USC § 1367(d).

Section 1367(d) provides that the limitations period for a claim over which the federal court has pendent jurisdiction "and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the [first mentioned] claim . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." Clearly, CPLR 205(a), which stops the limitations clock for the period of pendency plus six months rather than 30 days, provides a longer tolling period. Thus, state law controls and plaintiff must comply with the provisions of CPLR 205(a) to get the benefit of the toll under the federal statute as well. Finally, even under the version of the facts now advocated by plaintiff the federal toll would be unavailable because dismissal of the state law claims was not vol-

untary. "[D]ismissal of an appeal pursuant to a stipulation of discontinuance of said appeal does not constitute a voluntary discontinuance" (*Denehy* v. *St. John's Queens Hospital*, 114 AD2d 991, 992 [2d Dept 1985]).

Plaintiff's third alleged basis for a toll is the equitable tolling rule applicable to class actions (*American Pipe and Construction* v. *Utah*, 414 US 538 [1973], rehearing den 415 US 952 [1974]). That "rule" too is unavailing. Simply put, in *American Pipe*, the court held it was equitable and consistent with the relevant statutory scheme to toll the claim of individual putative class members upon commencement of a class action so that individuals who sought to intervene would not be penalized if class certification was denied. Since plaintiff's untimeliness problems stem from his own unexplained delay in serving defendants rather than from any denial of class certification, this equitable doctrine is clearly inapplicable (see *Singer* v. *Ell Lilly and Company*, 153 AD2d 210, 217 [1st Dept 1990]).

Since as discussed above all of plaintiff's claims are time-barred, the court will not address the merits of plaintiff's claims or defendants' remaining arguments for dismissal.

Accordingly, defendants' motion is granted to the extent that it seeks to dismiss plaintiff's complaint as time-barred and is otherwise denied as moot. The Clerk is hereby directed to enter judgment dismissing the complaint.

This decision constitutes the order of the court.

DATED: December 20, 2000

LOUIS B. YORK
J.S.C.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirteenth day of June 2002

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

1-10 Mo. No. 343

MARTIN GOLD, &C.,

Appellant,

—v.—

SQUADRON, ELLENOFF,
PLESENT & LEHRER, ET AL.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been

submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars cost and necessary reproduction disbursements.

STUART M. COHEN
Stuart M. Cohen
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirteenth day of February 2002

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 87 SSD 3

MARTIN GOLD, &C.,

Appellant,

—v.—

SQUADRON, ELLENOFF,
PLESENT & LEHRER, ET AL.,

Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

STUART M. COHEN

Stuart M. Cohen
Clerk of the Court

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on February 7, 2002.

Present: Hon. Peter Tom, Justice Presiding,
Israel Rubin
John T. Buckley
George D. Marlow, Justices.

M-7098
Index #102276/99

MARTIN GOLD, ETC.,

Plaintiff-Appellant,

—v.—

SQUADRON, ELLENOFF,
PLESENT & LEHRER, ET AL.,

Defendants-Respondents.

Plaintiff-appellant having moved for leave to appeal to the Court of Appeals from the order of this Court entered on November 13, 2001 (Appeal No. 5429),

NOW, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon, it is

ORDERED, that the motion is denied, with $100 costs.

ENTER:

CATHERINE O'HAGAN WOLFE
Clerk